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JOHN INNES CLARK HARE.

Judge John I. Clark Hare died at his home at Radnor, Pennsylvania, on the 29th of last December, in the ninetieth year of his age. At the time of his death Judge Hare was Emeritus Professor of Constitutional Law in the Law Department of the University of Pennsylvania. The elements which go to make a great judge or lawyer are so complex that it is hard to compare the ability and learning of the foremost living members of the profession. This difficulty is increased when we try to compare a man who has just died with those who led the Bar or made their reputation on the Bench one or more generations ago. Whether or not the late Judge Hare was the most profound jurist which the State of Pennsylvania has produced, as many of his contemporaries believe, it is certain that in modern times the Bar or Bench of Philadelphia has not produced a man his superior in common-law learning.

John I. Clark Hare was born in Philadelphia, October 17, 1816. Fourteen years later, in 1830, he entered the College Department of the University of Pennsylvania, graduating in 1834. In 1837 he received from the University the degree of Master of Arts. On leaving College he registered as a student of law in the office of William M. Meredith, afterwards to become and for many years remain the acknowledged leader of the Bar of the city and state. He was admitted to practice in 1841 and one year later married Miss Esther Coxe Binney, a daughter of the celebrated Horace Binney.

The next ten years he devoted to the practice of his profession and, in conjunction with Horace Binney Wallace, to a careful editorship of Smith's Leading Cases and White and Tudor's Leading Cases in Equity. The editorial work is so well done that, although four subsequent editions of Smith's Leading Cases have been published, the student of to-day will turn aside from the latest edition to ask for the edition which contains the learning which Judge Hare and Mr. Wallace embodied in their notes.

In 1851 he was elected on the Whig ticket as a judge of the then District Court of Philadelphia. In 1867 he became President of the Court, and in 1875, on the reorganization of the local court consequent on the adoption of the State Constitution of '74, he became President Judge of the Court of Common Pleas Number 2, a position he retained until his resignation in 1896. At the time of his resignation he was eighty-one years old and had served continuously as judge for forty-five years. His principal decisions are preserved in the *Legal Intelligencer* and the Philadelphia Reports. These Reports of a local County Court are not always accessible to lawyers in other parts of the state, while outside of the state they are to be found only in the larger law libraries. Nevertheless, Judge Hare's opinions rise so far above the ordinary level even of opinions of courts of last resort, that it is perhaps no exaggeration to say that his name is better known to the more learned portion of the profession than that of any other judge who has never held a position on an Appellate Court. Not long ago a member of the Bar of Philadelphia was addressing the Supreme Court of the United States. In the course of his argument he referred to one of Judge Hare's opinions, making some slight apology for bringing to the notice of the Court the opinion of a *nisi prius* tribunal. The Chief-Justice said: "We are familiar with many of the opinions of Judge Hare and no apology is necessary for bringing to our notice any decision of his bearing on the question under discussion."

Judge Hare was Vice-Provost of the Law Academy of Philadelphia from 1862 to 1863, and after the latter date he was made Provost, retaining the office until the time of his death. In 1880 he delivered the annual address before the members of the Academy and invited guests, his subject being "Politics in England and the United States." In this lecture he pointed out the difference between the cabinet systems in England and this country, and advocated the substitution of "Parliamentary government for personal, by rendering the Cabinet responsible to Congress, and removable as in England on a vote of want of confi-

dence." Without some such reform as this he felt doubtful if the republic could "bear the stress to which it is periodically subjected, or hope for another hundred years of life."

In this pamphlet he also noted the strong objection to government by party. It was in discussing the election of the President by electors pledged to give their vote to the nominee of one or the other party that Judge Hare said:

"No one can exercise the right of suffrage at the primary elections without being registered as a party man, and those only have controlling influence who are partisans. The successful merchant, the substantial tradesman, and the industrious artisan, stand aloof, and their place is filled by adventurers, who make a trade of politics, with a view not so much to the honors of public life as to its gains. Hence it happens that the American people are governed for many purposes, and especially as it regards the choice of the men who fill the halls of legislation, and administer the executive departments of the government, by an oligarchy whose merit does not compensate for their numerical insignificance."

In 1858 Judge Hare became a Trustee of the University of Pennsylvania. In 1868, on the resignation of Judge Sharswood, who had been elected to the Supreme Court of the State, he was appointed by the Trustees Professor of the Institutes of Law.

When Judge Hare resigned from his professorship in 1888, he was elected Emeritus Professor of Constitutional Law. This office, as stated, he retained at the time of his death.

In connection with his duties as Professor, he published in 1887 a work on Contracts and two years later a work on American Constitutional Law. The latter work is a scholarly effort to deal with our Federal Constitutional Law, and especially to examine the questions arising out of the Civil War and the 14th and 15th amendments to the Constitution. It is not, however, his work on Constitutional Law, but his work on Contracts, which entitles him to a place among those text writers who have made permanent contributions to our legal literature.

The period of the Revival of Common-Law Learning is the appellation which future historians of our jurisprudence will apply to the closing years of the nineteenth century and the beginning of the twentieth. No accurate

account of this extraordinary renaissance could be written without recording the work of Judge Hare in the field of English Contract Law. His book on Contracts was published January 1, 1887. Sir Frederick Pollock's work on Contracts, published in 1880, had confessedly failed to illuminate the origin of the doctrine of Consideration. Mr. Justice Holmes' works on the Common Law published in 1881, advanced an ingenious speculative explanation, but the chain lacked many links. Judge Hare conclusively demonstrated from the Year Books that the English doctrine of Consideration was wholly insular in its origin, that it does not derive from the *causa* of the Roman Law, but that its origin was to be found in the conception that the promisee's unfulfilled expectations created by the defendant were a species of deceit remediable in the action on the case. Contemporaneously with Judge Hare, Professor Ames investigated the Year Books and in 1888 published his essay upon the History of Assumpsit, verifying the historical accuracy of Judge Hare's inductions by a still more comprehensive examination of early cases. This simultaneous discovery of the origin of a most important legal conception strikingly recalls the simultaneous and important invention of the infinitesimal calculus by Leibnitz and Descartes. Sir Frederick Pollock was prompt to acknowledge the valuable work of these two American scholars: "Judge Hare," he declares, "and Mr. Ames have been the first to make out an organic connection between the tortious character of Assumpsit and the doctrine of Consideration in its early form."* And again Sir Frederick observes that "the influence of the action of deceit in forming the English doctrine of Assumpsit . . . is now put beyond question by the researches of Judge Hare and Mr. Ames."†

One directly practical conclusion from Judge Hare's discovery of the origin of the doctrine of Consideration he himself pointed out:

"It was moreover and still is essential that the act which consti-

* Pollock on Contracts, 6th London Ed., pp. 700, 701.

† 6 *Harvard Law Review*, p. 391.

tuted the consideration should be something for which the defendant stipulated and not merely something which the plaintiff did in reliance upon the defendant's word. A promise to give another \$1,000 is not less a *nudum pactum* because the promisee buys a house in the belief that the money will be forthcoming, but a promise to give \$1,000 if the plaintiff will make such a purchase becomes obligatory as soon as the condition is fulfilled.*

In the extension of the conception of deceit Judge Hare argued was to be found the basis of the liability on reciprocal promises:

"A recovery could not, as I suppose, have been had in England before the close of the fifteenth century, unless the plaintiff had acted in reliance on the promise which he sought to enforce, but it soon became obvious that a man may sustain a real loss from the breach of an agreement which has not been carried into effect on either side."†

In two other aspects Judge Hare's work in the field of Contracts deserves special mention. His treatise is in reality one upon comparative jurisprudence, showing, as none other has done, the essential points of contract and similarity between the English and the Civil Law. Again, before him no writer had attempted to describe even in faintest outline the conception of simple Contracts that antedated Assumpsit. This in part at least Judge Hare attempted to do. He described with rare intelligence how certain promises not previously enforceable clamored loudly for judicial recognition in the fifteenth century. He showed how by the machinery of an action on the case these promises were gradually recognized to be what we now call contracts and he indicated, in a general way, some of the enforceable contracts prior to Assumpsit.

Like all great investigators on every field of human knowledge, Judge Hare was impressed not so much with what he had achieved as with what yet remained for others to do. After describing the difficulties attending the study of the Year Books he observes with that humbleness which is an incident of true greatness:

"A history of the development of English law from such materials would require a more comprehensive and thorough analysis than has yet been made; and while assumpsit unquestionably sprang from the

* Hare on Contracts, p. 135.

† Hare on Contracts, p. 136.

attention conferred by the statute of Westminster II, we may not be so sure of the exact line of descent."*

It is a matter of regret that his judicial labors as a *nisi prius* judge did not afford him sufficient time to describe and fully analyze from a historical standpoint other contractual conceptions besides *Assumpsit*. But the marvel is that he found time to do so much. He had the rare gift of using simple language to express abstruse thoughts. His mind clarified every subject of which he wrote. Above all his daily practical experience upon the bench impelled him to show throughout his literary work the application of his mediæval learning to modern problems.

Upon the opening of the Law School of the University on October 1, 1877, Judge Hare delivered a lecture on the ethical nature of jurisprudence. The following quotations from his remarks on that occasion will not only give the reader a good example of his style but perhaps also lead him to perceive the strength of the ethical side of his character. He says:

"It may be true that the '*honestum*' and the '*utile*,' the expedient and the just, are two lines which produced meet somewhere in eternity; but it is certain that Prudence, as we know her, is often a time-serving counsellor. When Conscience indicates the path of duty, she, or the ambition, or the cowardice, or the love of pleasure which takes her shape, whispers that it cannot be followed without foregoing cherished hopes, or encountering dangerous enmities, or suffering the loss of place or fortune, or—and such things have been—undergoing the dungeon or the rack. The flesh may recoil, passion may rebel, or ambition beckon, but Conscience is inexorable. She demands all and promises nothing, and yet how often has everything been surrendered in obedience to her command. This it is that gives ethical truth the sanction and force of law, and it is here that the difference between moral and physical law, as belonging to different universes, is distinctly visible. The perception of a truth in geometry, in mechanics, or in chemistry may be pleasurable, or it may produce a painful impression by falsifying our preconceived ideas, but it is not like the perception of ethical truth, attended with the sense of obligation, which is never absent when the mind takes cognizance of the relations which are the source of right. If we accept this phenomenon with its correlative, the freedom of the will as given to us by consciousness, it is an inevitable inference that man has that within him which transcends the order of physical causation. Given a moral law, there must be something of which it is predicable, and that is not material, because matter is governed by physical laws which are exclusive in their operation."

He then went on to develop the relation between ethics

* Hare on Contracts, p. 138.

and jurisprudence, his thorough knowledge of the subject giving him the ability to handle his topic with so sure a hand that he presented a clear and cogent outline within the limits of a few printed pages. He ended by saying that he trusted he had not wholly failed to show "that jurisprudence originated in the distinction between right and wrong, which again could not exist as a source of obligation if man were the slave of physical causation and did not obey a higher law. Hence, we may believe, with Ulpian, that some knowledge of things divine as well as human is essential to that accurate comprehension of right which is the only secure foundation of jurisprudence.

"The knowledge of things divine as well as human;" which he held to be essential to that accurate comprehension of the right which is the only secure foundation or jurisprudence, was his. It resulted as such knowledge must, in a "rectitude of purpose," which he spoke of as characteristic of a brother judge. Further words of his spoken of that same judge have been used to characterize his own qualities of life and mind, as when he spoke of the "singleness of heart which has rendered Judge Stroud incapable of harboring any thought at variance with the straightforward performance of his duty," or when he said, "No man who intended to pursue a crooked or selfish policy ever dreamed of obtaining his aid or countenance."

It has been said that he was bred in the traditions of the Elder Bar and that these qualities were in a way the outcome of those traditions. Whether of the Elder or the Younger Bar, he stood as a living exponent of those ethical traditions which compel men, in all situations, however complicated, to live up to the highest honesty, to the faithful performance of any trust, and to that simple devotion to duty all of which so often means the highest heroism.

Wm. Draper Lewis.